

Overhead Door Corporation (Todco Division) and District Lodge 65, Local Lodge 2102, International Association of Machinists & Aerospace Workers, AFL-CIO. Cases 3-CA-10137, 3-CA-10260, and 3-CA-10446

April 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On December 17, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, both Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

1. The Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee William Eaton on November 21, 1980,³ because of his participation in a strike which commenced on May 5. Although the Administrative Law Judge found that Eaton engaged in picket line misconduct on July 15 which warranted his discharge, he found that Eaton's misconduct was not the reason for his discharge. Because of the "inordinate delay" between the date of the misconduct and the date of the discharge, the Administrative Law Judge concluded that Respondent's reliance on Eaton's misconduct as justification for his discharge was pretextual and that the real reason for his discharge was his activities on behalf of the Union. Respondent excepts to the finding that Eaton's discharge was unlawful, contending, *inter alia*, that the Administrative Law Judge's reliance on the passage of time between the

misconduct and the discharge was unwarranted. We find merit in this exception.

The record reveals that by letter dated November 21 Respondent discharged approximately 11 strikers because of picket line misconduct which occurred, with one exception, on July 15.⁴ The Union thereupon filed charges with the Board alleging that these discharges violated Section 8(a)(3) and (1) of the Act. After investigation, the Regional Director issued a complaint, alleging as unlawful three of these discharges, those of Frank Haynoski, William Purdy, and William Eaton. The basis for the complaint, as advanced at the hearing by counsel for the General Counsel, was that these three employees did not in fact engage in picket line misconduct as alleged by Respondent. Counsel for the General Counsel never questioned Respondent's good faith in asserting picket line misconduct as the reason for these discharges and never urged that Respondent's 4-month delay in effectuating the discharges suggested that the alleged misconduct was not in fact the true reason for the discharge. Thus, neither party addressed the issue of the 4-month delay, and the record is silent as to Respondent's reasons for the delay. Nor is there any evidence in the record to suggest that Respondent's delay in discharging Eaton was in any way different from its delay in discharging any of the other 10 strikers. Under these circumstances, we are unwilling to question at this time the causal connection between Eaton's misconduct and his discharge, or to speculate on the sole basis of the delay, and, in the absence of any supporting evidence, that Respondent's reliance on Eaton's misconduct as justification for his discharge was pretextual.

Since we agree with the Administrative Law Judge for the reasons stated in his Decision that Eaton did in fact engage in picket line misconduct on July 15 as alleged by Respondent, we find that Respondent's subsequent discharge of Eaton because of this misconduct was lawful. Accordingly, we hereby dismiss this allegation of the complaint.⁵

⁴ One striker, William Purdy, was discharged because he allegedly harassed strike replacements after work on July 23 as they were driving to their homes.

⁵ The Administrative Law Judge, admitting that he was giving legal advice as to the propriety of future conduct, concluded that Respondent's "unconditional" offer of reinstatement to Eaton on January 19, 1981, to minimize backpay liability, constituted condonation of his picket line misconduct. Therefore, according to the Administrative Law Judge, if Respondent subsequently discharges Eaton, as Respondent announced at the hearing it would do if it prevailed in having the complaint dismissed, Respondent would violate Sec. 8(a)(3) and (1) of the Act. As it is our policy not to prejudge factual or legal issues, we do not rule at this time on the issue of whether Respondent's reinstatement of Eaton constituted condonation of his picket line misconduct. See *General Dynamics Corporation, Pomona Division*, 184 NLRB 553 (1970). We emphasize that our not passing on this issue should not be construed either as indicating agreement or disagreement with the Administrative Law Judge's ultimate conclusion with respect to the issue of condonation.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² To assure a "make-whole" remedy, we shall order Respondent to expunge from its files any references to the November 21, 1980, discharges of Frank Haynoski and William Purdy and to notify them both in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future discipline against them.

³ All dates are in 1980 unless otherwise noted.

2. The Administrative Law Judge found, and we agree, that the nine employees hired by Respondent on November 24 and December 4 were hired as production employees and were not hired as guards within the meaning of the Act. However, the Administrative Law Judge found that strikers Alice Lemk and Joyce Miller made unconditional offers to return to work by letter on August 29, and that striker James Stockwell made an unconditional offer to return to work by telephone on October 19. Therefore, the Administrative Law Judge found that Respondent's failure to recall these three strikers to work on either November 24 or December 4 violated Section 8(a)(3) and (1) of the Act. Respondent excepts to this finding, contending that none of these strikers made an unconditional offer to return to work prior to Respondent's hiring of employees in November and December. We find merit in this exception.

Certain strikers made their unconditional offers to return to work by signing one of two joint letters which were sent to Respondent. One of the letters is dated January 23, 1981. However, the letter signed by Lemk and Miller, among others, is undated. In his opening statement at the hearing, counsel for the General Counsel stated that both of these letters were signed in "late January." However, when counsel for the General Counsel offered the undated letter as an exhibit, the transcript shows that counsel for the General Counsel stated that the undated letter was received by Respondent "on or about August 29, 1981." In his brief to the Administrative Law Judge, counsel for the General Counsel moved that the transcript be amended by changing this reference from "August" to "January." This motion was unopposed by Respondent. The Administrative Law Judge, however, without ruling on counsel for the General Counsel's motion and without any discussion, apparently concluded that the undated letter was received by Respondent on August 29, 1980. There is nothing in the record to support this conclusion of the Administrative Law Judge. Rather, as shown above, the record supports an inference, which we hereby draw, that the undated letter was received by Respondent on January 29, 1981. Thus, since Lemk and Miller did not make unconditional offers to return to work prior to the hiring of nine employees on November 24 and December 4, Respondent was under no obligation to recall them to work on those dates. Accordingly, we hereby dismiss this allegation of the complaint.

As to Stockwell, the parties stipulated to the accuracy of the log maintained by Respondent showing the names of strikers who telephone Respondent with offers to return to work; the dates of such

calls; the jobs they had held prior to the strike; whether their former jobs had been filled by replacements; the positions, if any, offered to them by Respondent; whether such offers were accepted; and the dates the strikers returned to work. The log reveals that on October 9 Stockwell telephoned Respondent. On October 10 Respondent informed Stockwell that his former position had been filled, and Stockwell advised Respondent that he would accept another position. On October 19 Respondent telephoned Stockwell and offered him a fabrication position on the second shift. Stockwell stated that he would let Respondent know the next day if he would accept the offer, but Stockwell did not contact Respondent again until December 15, when he asked for any job on the day shift. Under these circumstances, we find that Stockwell's October 9 offer to return to work was negated by his failure to respond to Respondent's October 19 offer of a job and that Stockwell did not reinstate his offer to return to work until December 15—a date after Respondent had hired additional employees. Accordingly, we find that Respondent did not unlawfully fail to recall Stockwell to work, and we hereby dismiss this allegation of the complaint.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3:

"3. By discharging striking employees Frank Haynoski and William Purdy because of activities on behalf of the Union and by failing to recall striking employee Harold Swan to a vacant position upon his unconditional offer to return to work, Respondent violated Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Overhead Door Corporation (Todco Division), Cattaraugus, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Make whole Frank Haynoski, William Purdy, and Harold Swan for any loss of pay or benefits they may have suffered by reason of the discrimination against them, with interest, in the manner described in the section of this Decision entitled 'Remedy.'"

2. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the discharges of Frank Haynoski and William Purdy on November 21, 1980, and notify them both in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future discipline against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations as to which no violations have been found be, and they hereby are, dismissed.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

Overhead Door Corporation (Todco Division), is posting this notice to comply with the provisions of an order of the National Labor Relations Board. The order was issued after a hearing before an administrative law judge in a case in which we were found to have committed certain unfair labor practices.

WE WILL NOT discourage membership in or activities on behalf of District Lodge 65, Local Lodge 2102, International Association of Machinists & Aerospace Workers, AFL-CIO, by discharging strikers, failing to recall strikers to vacant positions upon their unconditional offer to return to work, or otherwise discriminating against them in their hire or tenure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL make whole Frank Haynoski, William Purdy, and Harold Swan for any loss of pay or benefits they may have suffered because of the discrimination practiced against them, with interest.

WE WILL expunge from our files any references to the discharges of Frank Haynoski and William Purdy on November 21, 1980, and WE WILL notify them both in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future discipline against them.

OVERHEAD DOOR CORPORATION
(TODCO DIVISION)

DECISION

STATEMENT OF THE CASE

FINDINGS OF FACT

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me in Little Valley, New York, upon a consolidated unfair labor practice complaint,¹ issued by the Acting Regional Director for Region 3 of the National Labor Relations Board which alleges that Overhead Door Corporation (Todco Division) (herein called the Respondent)² violated Section 8(a)(1) and (3) of the Act. More particularly, the consolidated amended complaint alleges that the Respondent refused to grant timely reinstatement to seven named employees who had participated in an economic strike, failed to grant timely reinstatement to striker Harold G. Swan after he had made an unconditional offer to return to work, and discriminatorily discharged strikers William Eaton, Frank Haynoski, and William Purdy. The Respondent contends that it granted reinstatement to the above-named strikers, including Swan, as soon as it had positions available for them to fill and that Eaton, Haynoski, and Purdy were discharged for misconduct during the strike. Upon these contentions the issues herein were joined.³

The Unfair Labor Practices Alleged

The Respondent and its predecessors have operated two plants, known as Plant No. 5 and Plant No. 3, which are located in or near the small town of Cattaraugus in western New York State. The Respondent and its predecessors for a number of years had collective-bargaining agreements with the Union covering the 100 or so production and maintenance employees who worked at these plants. The most recent of these agreements expired on April 30, 1980. On May 5, a strike was called to

¹ The principal docket entries in this case are as follows:

Charge filed by District Lodge 65, Local Lodge 2102, International Association of Machinists & Aerospace Workers, AFL-CIO (herein called the Union), against the Respondent in Case 3-CA-10137 on December 2, 1980; charge filed by the Union against the Respondent in Case 3-CA-10260 on February 11, 1981; charge filed by the Union against the Respondent in Case 3-CA-10446 on May 12, 1981; complaint issued by the Regional Director for Region 3 on January 13, 1981, in Case 3-CA-10137; the Respondent's answer in Case 3-CA-10137 filed on January 22, 1981; amended complaint and order consolidating Cases 3-CA-10137 and 3-CA-10260 issued by the Regional Director on March 18, 1981; the Respondent's answer in Cases 3-CA-10137 and 3-CA-10260 filed on March 31, 1981; second amended complaint, including Case 3-CA-10446, issued by the Acting Regional Director on June 30, 1981; the Respondent's answer thereto filed on July 8, 1981; hearing held in Little Valley, New York, on October 7 and 8, 1981; briefs filed with me by the General Counsel and the Respondent on or before November 23, 1981.

² The Respondent admits, and I find, that it is a Texas corporation which maintains its principal office in Dallas, Texas, and plants in and about Cattaraugus, New York. At its Cattaraugus, New York, plants the Respondent manufactures and sells laminated components and related products, and ships directly to points and places located outside the State of New York goods and merchandise valued in excess of \$50,000 per year. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

³ Certain errors in the transcript herein are hereby noted and corrected.

enforce the Union's contract demands. The record in this case reveals that the strike was manifestly unsuccessful. Despite the fact that negotiations took place over a period of months, no contract has yet been concluded and the strike has, in effect, been abandoned.

During the strike, the Union picketed both Plant No. 3 and Plant No. 5. Plant No. 3 was completely closed for a period of several months. The Respondent attempted to operate Plant No. 5 with about 33 supervisory and managerial personnel. The events which form the basis of this case occurred at Plant No. 5, located on Route 353 just south of the Village of Cattaraugus. Both plants were being actively picketed by the Union during the summer of 1980.

On July 2, the Respondent wrote a letter to all striking employees in which it notified them that the Respondent was going to attempt to operate the plant with new employees. The letter, signed by Plant Manager Donald R. Ritter, stated as follows:

Your job and your future with our Company are now at stake, as is the future of our plant in Cattaraugus. Your Union and the Company have bargained long and hard, and in complete good faith. We are now at an impasse and anticipate no further negotiations.

The plant will be re-opened for business, but before we hire a permanent replacement for your job, you have the opportunity to return to work at the final offer the Company made on wages, fringes and contract, which is included with this letter.

* * * * *

. . . If you fail to call or come in by 5:00 pm, July 8th, the Company will begin to advertise and accept applications and hire new employees who will permanently replace any employee whose job they fill.

If you do not report by 5:00 pm, July 8th, you may report after such date and time. However, if your job has been filled by a permanent replacement, your employment and status with the Company will be determined by law.

Throughout the week following July 8, the Respondent interviewed applicants to replace striking employees at Plant No. 5 and was able to secure about 20 to 30 replacements to augment the staff of managerial and supervisory employees that had been keeping the plant open during the first 2 months of the strike. Because the entrance to the plant was being actively patrolled by union pickets, the Respondent anticipated that its recruits would experience some difficulty in gaining access to the building. Their fears proved to have ample foundation.

Tuesday morning, July 15, was set as the first day for strike replacements to go to work. Rather than ask the replacements to report individually to the plant, the Respondent arranged for them to meet managerial and supervisory personnel in the parking lot of a supermarket located in the village of Cattaraugus, a mile or so from the plant. The parking lot served as a staging area for a caravan of 15 to 20 privately owned cars and pickup

trucks which carried supervisors and strike replacements to the plant.

The caravan proceeded from the village to Plant No. 5 about 7:30 a.m., escorted by village policemen and deputy sheriffs. Two or three law enforcement officials were in place at the picket line to greet the caravan when it arrived. Also present to greet the convoy were 50 to 60 excited pickets who had been anticipating the arrival of strike replacements and who had been patrolling the entrance in a circular picket line.

The line of cars turned right from the state highway and approached the spot where the pickets were marching. At this point a melee took place. The police directed the lead car—a 1973 Ford pickup truck driven by plant Superintendent Ronald Gemmill—to proceed slowly through the picket line. As the truck inches its way through a mass of shouting, screaming humanity, pickets grabbed the truck, began to rock it, showered it with rocks, and beat on its doors and panels. The truck made it through the picket line and up the hill which lead to the plant building, but not before the front window had been smashed. Gemmill is not sure whether it was smashed by a rock, a stick, or a picket sign. The other trucks and cars made it through the picket line but several were similarly accosted by pickets, some of whom damaged the fenders or the headlights by swinging baseball bats, sticks, and other items at the vehicles as they passed. Four or five pickets were arrested during this incident and were charged with various offenses.

No serious picket line confrontations occurred thereafter, although the driveway to the plant had to be swept periodically to remove debris, such as broken glass and roofing nails. Strikers continued to picket throughout the summer and the fall. As Plant No. 5 began to resume normal operations, the Respondent hired Security Alert, a Buffalo-based plant security company, to patrol the premises and to monitor activities at the picket line.

Approximately 11 employees were discharged because of picket line activities which occurred on the morning of July 15. This number included discriminatees William Eaton and Frank Haynoski. A third discriminatee, William Purdy, was discharged because, on July 23, he assertedly buzzed or harassed homeward-bound strike replacements as they drove their cars along County Route 10 in the town of New Albion, some miles from the entrance to Plant No. 5. The details of these incidents will be discussed, *infra*. All three were first notified of their discharges by similar letters, dated November 21. Eaton was told that he had committed serious acts of misconduct on July 15, consisting of unlawfully supplying weapons, including bats and clubs, to other striking employees for use in intimidating those who sought to enter or leave the plant premises. Haynoski was accused of unlawfully breaking the windows of vehicles with a club as they were attempting to enter the plant. Purdy was accused of unlawfully chasing and harassing vehicles driven by the Respondent's employees on July 23.

In the late fall of 1980, it became apparent to the Respondent that the outside guard service was costing an exorbitant amount of money. It decided to replace the service with its own employees. The Respondent hired a

total of nine individuals on November 24 and December 4 with the clear understanding that they would be assigned to guard duty as long as the Respondent felt that its plant security needs required special guards. After their guard services were no longer needed, they were assured regular production jobs. Beginning about December 10, eight of these individuals were placed on guard duty, four at Plant No. 3 and four at Plant No. 5. They were given uniforms, placed at the entrances to the plants during the day, and were told to exclude unauthorized persons from company premises. After the end of the second shift, they locked the gates and made the rounds of plant buildings. Later, they were assigned cleanup duties to fill out their night and weekend shifts. During the approximately 4 months that they were assigned to guard duties, these eight employees worked a 32-hour shift one week and a 48-hour shift the following week. Shortly before April 6, the Company determined that the security situation was such that it could dispense with regular guard protection. The picket line which operated only sporadically during the winter was gone, most striking employees had returned to work, and acts of vandalism, such as dusting the driveway with debris, had ceased. Accordingly, on April 6, the Respondent transferred the plant guards to production jobs, and they have continued to hold those positions since that time.

On or about August 29, 1980, some 16 strikers signed and delivered to the Respondent a round-robin letter making an unconditional offer to return to work. As of October 20, the Respondent had employed about 95 to 100 production employees, of which number about 30 to 35 were returning strikers. It was operating on a two-shift basis. Between December 4 (by which time the nine plant guards had been hired) and March 31, 1981, the Respondent did not hire or reinstate any production employees, except for discriminatees Eaton, Haynoski, and Purdy, who were offered reinstatement by letters dated January 19, 1981.⁵ All three accepted. However, Purdy worked only a day and a half after returning and then quit. On or about January 25, some 36 strikers signed and delivered to the Respondent another round-robin letter offering unconditionally to return to work. None of them were put back on the payroll until March 31 or thereafter.

At the time the strike began, striker Harold Swan was a shear operator. Before that time he had been employed at the higher rated job of clipper operator but, in the latter position, had to work the second shift. Late in October, Swan called Plant Manager Ritter and asked to go back to work. He told Ritter that he was a shear operator and would be primarily interested in that position. Ritter replied that there was nothing available at the time and suggested that Swan called back later. In December, Swan learned that the clipper operator, Dan Czechowski, was leaving the Company and that shear operator John Perkins was being promoted to take his place. Czechowski left on December 31. On January 5, Swan called Perkins and asked about the vacancy which

was being created by Perkins' promotion. Ritter said that the facts which had come to Swan were true but, at that time, the Company was not hiring anyone to fill the shear operator position because it had no need for a full-time shear operator. Swan then told Ritter he would accept any position available. In fact, between January 5 and March 31, the Respondent filled the vacant shear operator position on approximately 37 working days by assigning the job temporarily to Peggy Maybee, who was working in the shop as a shear helper.⁶ The Respondent claims that it was following a provision in the expired contract which permitted temporary assignments of employees to jobs under the stipulation that they would be paid the higher job rate if they filled the job for more than 5 consecutive days. On March 31, Swan was offered and accepted reinstatement as a shear operator, although the Respondent asserted at the hearing that it really did not need a full-time shear operator on its payroll when it took him back.

The following striking employees made telephonic requests to the Company to return to work on the dates set forth after their names. They also made written requests on one of the two letters which was placed into evidence. The date of their actual return or offer or reinstatement is set forth in the third column.

<i>Employee</i>	<i>Telephone Request(s)</i>	<i>Written Request</i>	<i>Reinstatement Offer</i>
William Struble	12-5-80	1-25-81	5-5-81
Alice Lemk	12-9-80	8-29-80	5-5-81
Joyce Miller	12-19-80	8-29-80	5-5-81
James Stockwell	10-19-80 12-15-80	1-25-81	5-5-81
Patricia Stockwell	12-15-80 1-7-81	1-25-81	5-19-81
Mary Edwards	1-20-81	1-25-81	5-19-81
Rick Cleveland	1-23-81	1-25-81	5-19-81

The General Counsel contends that these individuals should have been reinstated on April 6 when the Respondent transferred seven plant guards to production line positions.

Analysis and Conclusions

1. The discharges of Eaton, Haynoski, and Purdy

The Supreme Court laid out the basic principles governing the legality of the discharges of Eaton, Haynoski,

⁵ Eaton, Haynoski, and Purdy received offers 6 days after the General Counsel issued an unfair labor practice complaint in Case 3-CA-10137, alleging that they had been discharged for engaging in union activities and protected concerted activities.

⁶ Maybee was still regularly classified as a grade 2 shear helper at this time.

and Purdy in its decision in *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), when it said:

Over and again the Board has ruled that 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. [Citations omitted.] In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Certain gloss placed upon this holding by the Board relates only to which litigant has the burden of proof at different stages of the proceeding to establish the ultimate facts.⁷ If, in fact, an employee is not guilty of picket line misconduct which is asserted as the basis for his discharge, the employer's good faith in asserting it is immaterial. *Community Motor Bus Company, Inc.*, 180 NLRB 677 (1970).

William Purdy was fired on November 21, some 4 months after he assertedly buzzed or harassed nonstriking employees by passing them, driving his car in front of them, and then stopping suddenly in front of them while these employees were driving home from work. Purdy was a striker and the Respondent asserts that such conduct on his part was an effort to intimidate strike replacements, even though the events allegedly happened several miles from the picket line. The drivers of the other vehicles swore out criminal charges against Purdy and notified the Respondent of the event in question. However, they never showed up to prosecute the criminal charges and none of them appeared to testify at the hearing in this case to back up the allegations they made in the warrants which they signed. Purdy denied under oath the conduct attributed to him and his denial is uncontradicted by any probative evidence in this record. Accordingly, I conclude that he did not, in fact, commit the wrongs alleged. It follows from this conclusion that, when the Respondent discharged Purdy for strike related misconduct of which he was not guilty, it violated Section 8(a)(1) and (3) of the Act.

Frank Haynoski was discharged some 4 months after the July 15 picket line incident because he allegedly broke the window in Gemmill pickup truck while Gemmill was driving through the line. Haynoski denied breaking the window in Gemmill's truck and there is no testimony in the record which specially identifies him as the culprit. One of the Respondent's witnesses, James Miller, first testified that he saw Haynoski break the window in question and then, upon closer questioning, backed off from his earlier identification. Accordingly, I credit Haynoski's denial. There is no doubt that Haynoski was one of 50 to 60 pickets at the line on July 15,

and there is also no doubt that a short-lived but violent picket line confrontation occurred between pickets and those seeking to cross the line which resulted, *inter alia*, in the smashing of Gemmill's windshield. However, mere proximity of a particular striker to persons culpable of picket line misconduct is not enough to implicate the striker in the misconduct of others, in the absence of specific proof of his personal responsibility. *Gold Kist, Inc., supra*. In this case, there is no specific proof that Haynoski did anything more than stand or walk at or near the scene of the incident holding a picket sign when Gemmill's truck was being damaged. Accordingly, when the Respondent discharged Haynoski for picket line misconduct which he did not commit, it violated Section 8(a)(1) and (3) of the Act.

The case of William Eaton presents different and closer issues. Eaton was the vice president of the Local at the time of the July 15 incident. He is now the president. He was also one of the principal union negotiators in the collective-bargaining efforts which failed. The event upon which the Respondent relied in discharging Eaton also occurred at the picket line on the morning of July 15, just minutes before the violence erupted. The testimony relating to this event involves a head-on credibility issues. Company Vice President Donald R. Bowen, in charge of industrial relations, the Respondent's lead negotiator, was at the picket line on the morning in question. Bowen testified that he personally saw Eaton walk over to a car parked near the line, reach into the trunk, and pull out two handfuls of sticks and baseball bats. Eaton then returned to a group of strikers who gathered about him, presumably to take the items from him. It is clear from other testimony, including the film which is in evidence, that bats and sticks were used by certain pickets on vehicles a few minutes later in an effort to prevent them from crossing the picket line. There is no suggestion that Eaton himself used any of these weapons or that he personally did anything during the picket line riot other than patrol the area with a picket sign. Moreover, there is credible evidence that bats had been laying around the picket shack for a period of days and were used by pickets for impromptu ball games. There is also some evidence that paid union officials transported bats to the picket line from outside the Cattaraugus area. Eaton flatly denied using bats or sticks while picketing and denies supplying pickets with bats or sticks, as alleged. He testified further that he repeatedly instructed pickets throughout the strike to avoid all violent acts.

I credit Bowen's testimony and conclude that, a few minutes before the convoy of strike replacements arrived, Eaton handed pickets two handfuls of bats and sticks. In light of what occurred shortly thereafter, I conclude from these facts that Eaton's action on this occasion could be egregious misconduct which would justify the Respondent in discharging him, despite the fact that it occurred in a setting of protected activity. However, like any cause for discharge, the asserted cause must be the real cause. Even if employee conduct is violent, insubordinate, ill-tempered, or threatening, a discharge which occurs thereafter may still be a violation of Section 8(a)(1) and (3) of the Act if the misconduct is

⁷ *Farmers Co-Operative Gin Association*, 161 NLRB 887 (1966); *Rubin Bros. Footwear, Inc.*, and *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952); *Giddings & Lewis, Inc.*, 240 NLRB 441 (1979); *Gold Kist, Inc.*, 245 NLRB 1095 (1979); *Blair Process, Inc.*, 199 NLRB 194 (1972).

not the real cause of the discharge and is merely relied upon as a pretext. See *Lord & Taylor, a Division of Associated Dry Goods Corp.*, 258 NLRB 597 (1981), and cases cited therein. In Eaton's case, it was not until 4 months after the picket line misconduct occurred that the Respondent discharged him. By this time tempers had cooled, strike enthusiasm had materially waned, and strikers were seeking in large numbers to return to work. There was no need to delay the Respondent's action for purposes of investigation, since the evidence relied upon at the hearing in this case—the eyewitness observations of the Company's highest labor relations official—was available to the Respondent at the time of the incident. Moreover, Eaton was not just any union sympathizer but was (and is) the leader of the union cause within the plant. His absence would materially cripple the Union's ability to press future collective-bargaining demands or to rally its strength after a disastrous defeat at the picket line. Moreover, punitive action taken against him and other holdouts in November could well have had the effect of ending the strike in its entirety and cooling the ardor of those who were still determined to carry on.

Normally, sharply defined acts such as insubordination or violence trigger a prompt response from an employer who is truly concerned about maintaining discipline among its work force. In such cases, spontaneity of action often provides a reliable clue to genuineness of motive. *Passaic Crushed Stone Co., Inc.*, 206 NLRB 81 (1973). In this case, the inordinate delay in bringing about Eaton's discharge casts more than a cloud of suspicion that picket line activity involving the furnishing of baseball bats was not the real reason for the discharge but was merely the excuse. Accordingly, I conclude that, by discharging William Eaton because of his membership in and activities on behalf of the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.

More than passing notice should be given to post-discharge actions of the Respondent concerning Eaton, Haynoski, and Purdy, since they bear not only upon the amount of backpay due and owing but also upon the merits of the discharges themselves. Shortly after the Regional Director issued the original complaint in these consolidated cases the Respondent wrote to each of these individuals and offered them reinstatement. In almost identical letters, dated January 19, 1981, the Respondent stated:

As a result of findings by the National Labor Relations Board concerning your discharge, it is immediately revoked and you are immediately reinstated as an employee of TODCO with no loss of seniority or status.

You are also hereby unconditionally offered, with no loss of seniority or status, the opportunity to return to work in the position of Fabricator, Grade 4, at the hourly rate of \$5.50. This is the position to which you would have been entitled had you not been discharged and had you evidenced a desire to return to work during the period November 21, 1980 to the present. Your former position . . . was not available during this period and is not available today, since all such positions and equivalent posi-

tions which had been available were previously filled by replacement employees and striking employees who returned to work prior to November 21, 1980.

Please contact the undersigned as soon as possible to indicate whether you wish to return to work. . . .

The above offer will remain open up to and including February 2, 1981. Please let me have the courtesy of a reply before then.

All three employees accepted the offer within the grace period allowed. Haynoski and Eaton are still employed. As noted above, Purdy left the day after he returned.

There were no "findings" by the Board concerning the three discharges as set forth in the above-quoted letters. As of this writing, no such findings have yet been made. The allusion in these letters to "findings" necessarily referred to allegations of wrongdoing contained in the complaint. Although no indication can be found in the above-referenced letters to the Respondent's reason for offering reinstatement, the Respondent now states that it took this action simply to mitigate its damages for back-pay liability should it not prevail in this proceeding. It candidly announced at the hearing that, if it prevails on the merits and the Board finds that the discharges were valid, it will then discharge Eaton and Haynoski again, presumably for the same reasons it originally asserted. The Respondent made no such reservations in its offers of reinstatement, which it described as "unconditional."

While the Board and its administrative law judges normally do not give legal advice as to the propriety of future conduct, these assertions by the Respondent should not go unnoticed. In *The Colonial Press, Inc.*, 207 NLRB 673, 674 (1973), the Board stated:

. . . when the employer, by his statements or conduct, evidences a lack of genuine concern about such misconduct by forgiving it or by offering reemployment despite the prior misconduct, we will not permit him subsequently to reassert the condoned conduct as a basis for refusing reemployment. For, once he has indicated that the misconduct on which he relied for severing the employment relationship is no longer his true reason for denying reemployment to those who have protested his unlawful acts, there can remain only the discriminatory reason for denying such reemployment—i.e., retaliation against such persons for having struck or picketed in protest against the employer's unlawful interference with employee rights.

The same rational holds true with respect to economic strikers. *Woodlawn Hospital*, 233 NLRB 782 (1977). See also *Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805, IBTCWHA v. N.L.R.B.*, 312 F.2d 108 (2d Cir. 1963).

It is idle for the Respondent to state now that it did not condone Eaton's July 15 activities when, on January 21, it offered him reinstatement unconditionally and

without reservation. The Respondent was then well aware of Eaton's picket line activities and no possible justification exists to hold that its reinstatement offer was less than the legal equivalent of condonation, notwithstanding any private misgivings or reluctance which the Respondent might still harbor. The Respondent's desire to mitigate its possible backpay liability cannot detract from the inescapable legal effect of what it actually did.

An unusual wrinkle exists in this case which is not found in most condonation cases; namely, the fact that the Respondent herein extended condonation after it discharged Eaton, not before the discharge took place. However, if condonation truly wipes the slate clean, as the Board has repeatedly stated, then it must do so retroactively on a *nunc pro tunc* basis. Moreover, the Respondent's willingness to forgive and forget so soon after it discharged Eaton bears upon the genuineness of its motive at the time it effectuated the discharge and supports a finding that, in fact, it indulged in a pretext from the beginning.

2. The reinstatement of Harold Swan

As found above, striker Harold Swan orally indicated to Plant Manager Ritter on or about October 20 that he wanted to return to his former job as shear operator. At that time, the job was being filled by replacement John Perkins. Under the Board's decision in *Laidlaw*,⁸ an economic striker is entitled, upon unconditional application, to return to his former or substantially equivalent employment if that position still exists and the respondent has no other business justification for refusing the request. He is not entitled to reinstatement if no job exists or if it has been filled by a permanent replacement. The facts of this case show that, until Swan made a second request for reinstatement on January 5, Perkins filled the shear operator job, except on certain occasions when he substituted on the clipper for Czechowski who was often absent for reasons of illness. On those occasions, Maybee, the grade 2 shear helper, took Perkins' spot, the same one that Swan had applied for. She did so approximately five times before Czechowski was terminated on December 31. Since Swan applied for permanent, not temporary or occasional employment, and as the opening on the shear operator arose during this period of time only on an occasional basis, I conclude that the Respondent was justified in denying Swan's initial application because the position was, in essence, filled by a replacement until December 31.

After the first of the year, a different situation arose. Perkins was promoted to the clipper operator job and left a vacancy in the shear operator position. The Respondent states that, between January 5 and March 31, when Swan returned, the same situation continued which existed before Czechowski's termination. It contends that no one really acted as shear operator and Maybee merely filled in, as she had in the past, on an occasional basis. The facts do not bear out this contention. The Respondent stipulated that, during January, February, and March, Maybee, serving without benefit of permanent

reclassification as shear operator, filled this job at the shear operator's pay on approximately 37 working days. Such employment extended to more than half of the working days which elapsed during this period of time. In fact, a vacancy in the operator's position not only existed after January 1, but was being filled by a temporary replacement during that period of time, despite the "declining orders" market which the Respondent was experiencing. It was being filled by temporarily promoting a strike replacement instead of reinstating Swan. It is well settled that a request for reinstatement may not be denied because the position has been filled by a temporary replacement. Under such circumstances, it was a violation of Section 8(a)(1) and (3) of the Act for the Respondent to refuse reinstatement to Swan or after the date when Czechowski was terminated. I so find and conclude.

3. The failure to recall seven strikers on April 6

Late in November and early in December 1980, when many employees were still on strike, the Respondent hired a total of nine new employees and assigned them to do guard duty in place of the outside contractor whose services were being terminated. Eight of these employees were so assigned. On April 6, when the Respondent judged that strike tension had eased to the point where it could discontinue guard operations, it assigned seven of these employees, at no increase in their basic wage rates, to do production work. The General Counsel contends that, when this assignment was made on April 6, the Respondent was in effect admitting that seven jobs were open and argues that the Respondent was under a legal obligation at that time to offer these jobs to strikers preference to the guards. The General Counsel argues that there was no essential difference between transferring guards to these positions and calling the unemployment office for new hires. All of the named discriminatees in question, with one exception, had sought reinstatement between the time the plant guards were hired and the time they were permanently reassigned to production work. One discriminatee, James Stockwell, had initially sought reinstatement by phone on October 19, before any guard employees had been hired. Two did so on August 29.

Under the Board decision in *Pillows of California*, 207 NLRB 369 (1973), and *Kennedy & Cohen of Georgia Inc.*, 218 NLRB 1175 (1975), an employer faced with requests by economic strikers to return to work may lawfully fill vacancies which arise in his plant by the nondiscriminatory transfer, promotion, or demotion of employees already working, so long as it does not hire new employees to fill the slots vacated by in-house transfers. With the exceptions noted above, this did not occur here. A lawful transfer situation normally arises only when there is a business down turn which would allow the company to continue its operations with a reduced work force. It can also happen when, as here, an entire function, such as policing the plant premises with specially designated employees, has been discontinued. Unlike the situation found in *Randall, Burkhart/Randall, Division of Textron, Inc.*, 257 NLRB 1 (1981), the Respondent in this case hired the transferred employees originally as production

⁸ *The Laidlaw Corporation*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969).

workers, assigned them to pull guard duty, and then transferred them back to the production floor. When it hired them in late November and early December, it made a commitment to retain them as permanent employees, even after the need for special plant security disappeared. These individuals were, in effect, production workers on temporary loan to the supervisor in charge of plant security. Hence, in April, when the need for their services as guards ceased, the Respondent had the choice of either discharging them or giving them production work. As they were permanent employees, the Employer had no obligation to terminate them in order to accommodate economic strikers who wished to return. *N.L.R.B. v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938). In this case, four of the seven discriminatees named in paragraph 7 of the second amended complaint were still on strike when the plant guards were originally hired. They did not signify their desire to return to work, either orally or in writing, until after the plant guards were on the Respondent's payroll under the arrangement described above. Accordingly, they have no claim of preference over employees hired at a time they preferred to remain away.

A different situation exists with respect to Alice Lemk, Joyce Miller, and James Stockwell, all of whom signified to the Respondent their desire to return, either by round-robin letter dated August 29 or by phone on October 19, before the plant guards were hired. The Respondent had no right to hire others in their place following their unconditional offers to return, unless it could justify the decision on some business-related basis, such as inability to perform a plant guard job. No such justification exists, none was argued here, and none is found in the record. Accordingly, I conclude that, when on November 24 and December 4, the Respondent hired employees who would ultimately either take the jobs sought by these three returning strikers or would postpone their return to work, it violated Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. The Respondent Overhead Door Corporation (Todco Division) is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Lodge 65, Local Lodge 2102, International Association of Machinists & Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging striking employees William Eaton, Frank Haynoski, and William Purdy because of activities on behalf of the Union; by failing to recall striking employee Harold Swan to a vacant position upon his unconditional offer to return to work; and by failing to recall striking employees Alice Lemk, Joyce Miller, and James Stockwell to vacant positions upon their unconditional offers to return to work, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. As all of the discriminatees in this case have at one time or another been offered reinstatement to their former or substantially equivalent positions, and as the General Counsel makes no contention that they have not ultimately received such reinstatement, I will not include a normal reinstatement remedy in my recommendation to the Board, but I will recommend that the Respondent be required to make whole William Eaton, Frank Haynoski, and William Purdy for any loss of earnings which they may have suffered by reason of their discharges on November 21, 1980, until such time as they were reinstated, that it make whole Harold Swan for any loss of earnings which he may have suffered from the date of the termination of Dan Czechowski until March 31, 1981, and that it make whole Alice Lemk, Joyce Miller, and James Stockwell for any loss of earnings which they may have suffered from the dates the plant guards were first hired until they were actually reinstated, to be computed in accordance with the *Woolworth*⁹ formula, with interest on these respective sums at the adjusted prime rate used by the Internal Revenue Service for computing interest on tax payments. *Olympic Medical Corporation*, 250 NLRB 146 (1980), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I will also recommend to the Board that the Respondent be required to post the usual notice advising its employees of their rights and of the remedy in this case.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER¹⁰

The Respondent, Overhead Door Corporation (Todco Division), Cattaraugus, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of District Lodge 65, Local Lodge 2102, International Association of Machinists & Aerospace Workers, AFL-CIO, by discharging strikers, failing to recall strikers to vacant positions upon their unconditional offer to return to work, or otherwise discriminating against them in their hire or tenure.

⁹ *F. W. Woolworth Company*, 90 NLRB 289 (1950).

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions designed to effectuate the purposes and policies of the Act:

(a) Make whole William Eaton, Frank Haynoski, William Purdy, Harold Swan, Alice Lemk, Joyce Miller, and James Stockwell for any loss of pay or benefits which they may have suffered by reason of the discriminations found herein, in the manner described above in the section of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at the Respondent's Cattaraugus, New York, plants copies of the attached notice marked "Appen-

dix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof, and shall be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Insofar as the consolidated complaint alleges matters which have not been found to be violations of the Act, the said complaint is hereby dismissed.

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."